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No. 94-1868

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

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NORTH CAROLINA POWER,
*Petitioner*,

v.

STATE OF NORTH CAROLINA *ex rel*,
UTILITIES COMMISSION,
*Respondent*.

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**On Petition for a Writ of Certiorari to the Supreme Court of North Carolina**

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## BRIEF FOR THE EDISON ELECTRIC INSTITUTE AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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## QUESTION PRESENTED

Under the Supremacy Clause, "States may not bar regulated utilities from passing through to retail consumers FERC-mandated wholesale rates." *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 372 (1988). The Public Utility Regulatory Policies Act of 1978 ("PURPA"), as implemented by regulations of the Federal Energy Regulatory Commission ("FERC"), delegates to state utility commissions the federal authority, previously exercised by FERC, to establish wholesale rates for power sold by cogeneration facilities. 16 U.S.C. § 824a-3(f).

The question in this case is whether the Supremacy Clause prohibits a state utility commission from barring a multi-state utility from passing through to retail conumers wholesale rates previously established for that utility by another state utility commission exercising the federal authority delegated to it under PURPA.

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## BRIEF FOR THE EDISON ELECTRIC INSTITUTE AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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### INTEREST OF AMICUS CURIAE

The Edison Electric Institute ("EEI") is the association of investor-owned electric utilities in the United States and industry affiliates worldwide. EEI's members serve 99 percent of all customers served by the investor-owned segment of the U.S. industry. As of December 31, 1993, they generated approximately 79 percent of all the electricity in the country and serviced 76 percent of all ultimate customers in the nation. Thirty-eight of the

member utilities of EEI are unified corporations serving consumers in more than one state, with fifteen of those companies subject to the jurisdiction of three or more state utility commissions. As such, the membership of EEI has a vital interest in the question presented by this litigation.

## STATEMENT

1. In *Public Utility Commission of Rhode Island v. Attleboro*, 273 U.S. 83 (1927), this Court held that state jurisdiction over the establishment of electric rates does not extend to interstate wholesale transactions, that is, to sales of electric power for resale. In response to the "regulatory gap" thereby created, Congress enacted the Public Utility Act of 1935, ch. 687, 49 Stat. 803, Title II of which amended the Federal Power Act of 1920, ch. 285, 41 Stat. 1063, to confer upon the Federal Power Commission, now the Federal Energy Regulatory Commission ("FERC"), exclusive jurisdiction over rates for most wholesale power transactions. Where FERC has authority to establish wholesale rates, State authority is preempted. *See Arkansas Elec. Co-op v. Arkansas Public Service Comm'n*, 461 U.S. 375 (1983); *FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964). And, by operation of the Supremacy Clause, state regulatory commissions, when exercising their "undoubted jurisdiction over retail rates," are obliged to permit full flow-through of the wholesale charges approved by FERC. *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 970 (1986); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371-2 (1988).

2. Prior to the enactment of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), P.L. 95-617, 92 Stat. 3117, FERC had exclusive authority to establish rates for power sold at wholesale, including power from entities that were to become qualifying facilities under PURPA. With the enactment of PURPA, Congress delegated to state regulatory commissions, acting pursuant to

rules to be promulgated by the FERC, the responsibility to establish the rates to be paid by utilities for wholesale purchases from qualifying facilities.[1] FERC's rules provided, among other things, that utilities must purchase power from qualifying facilities at a rate equal to the utilities' full "avoided costs."[2] PURPA imposed on each state utility commission the responsibility to implement FERC's rules for each utility within its jurisdiction. 16 U.S.C. § 824a-3(f)(1). This includes the responsibility to determine, or adjudicate disputes concerning, what wholesale rates must be paid under the federal "avoided cost" requirement. *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 759-61 (1982).

3. Petitioner, North Carolina Power, is the unincorporated division of Virginia Electric and Power Company ("VEPCO") that does business in North Carolina. It accounts for approximately five percent of total company retail revenues. The balance, or approximately ninety-five percent, comes from Virginia Power, the unincorporated VEPCO division in Virginia.

4. On November 12, 1987, Ultra Cogen Systems, Inc. ("Ultra Cogen"), a qualifying facility under PURPA, invoked the jurisdiction of the Virginia State Corporation Commission ("VSCC"), seeking an order directing the VEPCO system to purchase the output of nine projects proposed by Ultra Cogen. The VSCC is the state regulatory commission responsible for the regulation of electric utilities doing business in Virginia. As such, it is the state agency in Virginia that has been delegated responsibility for implementing FERC's PURPA rules. In a

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[1] "Qualifying facilities" refers to certain cogeneration and small power production facilities that, under PURPA, have an absolute right to sell their output to utilities. 16 U.S.C. §§ 796(17), (18), 824a-3(a), (b).

[2] 18 C.F.R. § 292.304(a)(2). FERC's "avoided cost" regulation was sustained by this Court in *American Paper Institute v. American Electric Power Service Corp.*, 461 U.S. 402 (1983).

series of orders issued between April 27 and November 18, 1988, the VSCC directed the VEPCO system to purchase the output of four Ultra Cogen facilities, all located in Virginia. Pet. App. 184a, 191a. Purchase was required at "avoided cost payments . . . based on Virginia Power's costs of constructing and operating Chesterfield Unit No. 7," a unit that VEPCO had earlier identified as "the prototype of any new capacity to be built by the Company through the mid-1990's, and perhaps beyond." Pet. App. 172a. VEPCO had objected to the VSCC's calculating its avoided costs based on its prototype unit, contending that lower priced alternatives would be available through a competitive solicitation. Pet. App. 173a. Judicial review of the VSCC's order requiring the purchase and specifying the pricing terms was not sought.

5. On July 31, 1992, North Carolina Power applied to its state regulatory commission, the North Carolina Utilities Commission ("NCUC"), for permission to increase its retail rates. Among the costs North Carolina Power sought to recover was the portion of the payments made to Ultra Cogen that represents the allocable share of the capacity of Ultra Cogen's projects used to provide service to that portion of the VEPCO system within North Carolina. The NCUC, while not taking issue with the purchase of capacity from Ultra Cogen, concluded that it would have determined North Carolina Power's costs to purchase the Ultra Cogen power to be lower than the costs determined by the VSCC for the overall VEPCO system. Accordingly, the NCUC denied recovery of the portion of the payment it found to be excessive—a disallowance of $1.39 million per year.

6. On appeal, the Supreme Court of North Carolina, in a 5 to 2 decision, upheld that disallowance. Recognizing that the avoided cost rates established by a state regulatory commission are "determined under federal rules implemented by each state for utilities subject to their ratemaking authority" (Pet. App. 6a), the Court nevertheless upheld the NCUC's right to disagree with the

VSCC's determination of avoided costs and to deny North Carolina Power recovery in retail rates based on that disagreement. It did so notwithstanding its "recogn[ition] that inconsistent determinations of avoided costs by the VSCC and the [NCUC] may burden NC Power," a burden that it dismissed as "a necessary consequence of doing business in more than one state." Pet. App. 11a. Two Justices, in dissent, expressed the view that:

> . . . [W]hen VSCC set the price NC Power must pay Ultra Cogen for the wholesale power at issue here, the VSCC was implementing federal law and making a determination affecting wholesale power in interstate commerce. The VSCC was making a determination which, but for the provisions of PURPA, would have been made exclusively by FERC; that determination was the functional and legal equivalent of an order by the FERC setting the price.
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> * * *
>
> No one questioned the jurisdiction of the VSCC to hear the dispute or to enter its decision. Ultra Cogen went to the VSCC rather than the NCUC because the wholesale sales at issue were to take place in Virginia. Once the VSCC entered its ruling, the obligation of NC Power to purchase wholesale power from Ultra Cogen and the price of that wholesale power were established by federal law. From that point on, neither the NCUC nor any other state agency was free to establish a different price that NC Power must pay Ultra Cogen for the wholesale power, even though it was to be resold in North Carolina.

Pet. App. 14a-15a, 18a-19a. The dissenting Justices concluded "that the determination of the VSCC had a preemptive effect equivalent to the preemptive effect of FERC orders establishing wholesale rates" and, under *Nantahala* and *Mississippi Power & Light, supra*, "the action of the NCUC was preempted by PURPA and by the essentially federal act of the VSCC . . . ." *Id.* at 9-10.

## REASONS FOR GRANTING THE WRIT

The North Carolina decision, if permitted to stand, would severely hamper the effectiveness of the Congressional delegation to state utility commissions of authority to establish the level of wholesale rates for power sold by qualifying facilities under PURPA. As the Court recognized in *Nantahala* and *Mississippi Power & Light*, the establishment of wholesale rates cannot be fully effective unless there is an assurance that they will be passed through to retail consumers. Under the North Carolina decision, a state commission setting wholesale rates under PURPA for a multi-state utility will not have that assurance.

PURPA establishes a scheme of "co-operative federalism" that allows the states to make federally binding decisions structured for their own particular needs. *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 767 (1982), quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981). In this respect, PURPA "resembles a number of other federal statutes . . . ." *Hodel, supra*, 452 U.S. at 290 and n.30 (citing cases). Unless it is made clear that the decisions of state regulatory agencies exercising delegated federal authority are as binding on other states as the decisions of a federal agency would be, the usefulness of this form of co-operative federalism will be severely diminished in any situation involving a multi-state impact. This Court has held under the Clean Water Act that the decision of a state agency establishing federal discharge limits pursuant to delegated federal authority cannot be second-guessed by courts in a downstream state. *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304 (1981).[3]

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[3] Courts in the downstream state may entertain suits based on state law, since the Clean Water Act, unlike PURPA, has a savings clause preserving state common-law remedies. *International Paper Co. v. Ouellette*, 479 U.S. 481, 485, 497 (1987). However, the

Similarly under PURPA, a state's decision under delegated federal authority, to be fully effective, must be as binding as the decision of a federal agency would be.

1. The North Carolina decision is in substantial tension with this Court's decisions in *Nantahala* and *Mississippi Power & Light*. In each of those holdings, the Court made clear that state regulatory commissions, though exercising plenary authority over the establishment of retail electric rates, must give full effect to the rate determinations of the FERC made within its area of exclusive authority. This case presents the logical next question—whether a state commission must accord similar effect to wholesale power rates established by a neighboring state pursuant to a delegation of federal authority.

2. There can be no dispute that the charges North Carolina refused to permit to be recovered in retail rates are charges for wholesale power sales in interstate commerce.[4] Those are the only power sale transactions covered by PURPA and, but for the delegation, the VSCC could not have exercised jurisdiction over the Ultra Cogen-VEPCO transaction.[5] It exercised jurisdiction be-

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downstream state may not apply federal law to the discharge, if the upstream state in which the discharger is located has established federal limits pursuant to delegated authority. *City of Milwaukee, supra.*

[4] The interstate character of the Ultra Cogen-VEPCO/North Carolina Power transaction is apparent—the facilities are located in Virginia and the portion of the power at issue is consumed in North Carolina. It has long been settled that federal jurisdiction over wholesale power sales, with minor exceptions not relevant here, is pervasive and exclusive. *FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964).

[5] In a recent declaratory order, the FERC observed:

> PURPA gave the states a specific but limited role to set wholesale rates pursuant to the statute and the Commission's regulations—a role that in most instances they would not otherwise

cause federal law so required,[6] and it exercised jurisdiction that, absent the delegation, would have been FERC's alone to discharge.

Neither the NCUC nor the North Carolina Supreme Court take issue with the jurisdiction of the VSCC over the price to be paid by VEPCO, and by extension by its North Carolina division, to Ultra Cogen. Rather, each assumes that notwithstanding that exercise of federal jurisdiction by Virginia, North Carolina remains free to disagree with Virginia's determination of price. But the VSCC's jurisdiction to make the wholesale rate determination included jurisdiction to make what third parties—such as the NCUC—might consider to be a mistake. The VSCC's decision, whether or not it resulted in the best price for retail customers, was an exercise of plenary jurisdiction under a federal statute, which the NCUC "may not alter . . . by substituting [its] own determination[] of what would be just and fair." *Mississippi Power & Light, supra,* 487 U.S. at 371.[7]

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have had since QF sales primarily are sales for resale in interstate commerce.

*Connecticut Light & Power Co.*, 71 FERC ¶ 61,035, p. 61,153 (1995).

[6] *Mississippi, supra,* 456 U.S. at 759-61.

[7] There is no occasion in this case to decide whether the VSCC, as part of its obligation under section 210(f) of PURPA to "implement" FERC's rules, has an obligation to reopen a prior decision that violated the avoided cost limitation established by PURPA. 16 U.S.C. § 824a-3(f). FERC has ruled that a state has no such obligation, even where FERC's interpretation of applicable law makes it plain that the prior state decision was in violation of that limitation. *Connecticut Light and Power Company,* 70 FERC ¶ 61,012, *reconsideration denied,* 71 FERC ¶ 61,035 (1995); *Orange and Rockland Utilities, Inc., Rockland Electric Company and Pike County Light & Power Company,* 70 FERC ¶ 61,014, *reconsideration denied,* 71 FERC ¶ 61,034 (1955). Suits challenging this ruling have been filed. *Niagara Mohawk Power Corporation v. Federal Energy Regulatory Commission,* D.C. Cir. Nos.

Nor can North Carolina draw comfort from the limited reservation of state authority—suggested by this Court in *Nantahala* and *Mississippi Power & Light*—to determine that a utility "purchase[d] unnecessary quantities of high cost power, even at FERC-approved rates, if it had the legal right to refuse to buy that power." *Mississippi*, 487 U.S. at 373-4; *Nantahala*, 476 U.S. at 972. As in *Mississippi*, where that possible reservation was foreclosed by the FERC order directing the utility "to procure the particular quantity of high-priced" power (487 U.S. at 474), here PURPA mandated that VEPCO (including its North Carolina division, North Carolina Power) purchase the entire output tendered by Ultra Cogen. 16 U.S.C. § 824a-3(a); 18 C.F.R. § 292.303(a).

Had the wholesale rate charged by Ultra Cogen been fixed in a non-PURPA transaction, the NCUC would have been restricted to seeking redress in a review action from that FERC determination. It would not have been free to exercise "self-help." The current situation contains a parallel. Apart from the judicial review procedures to which decisions of the VSCC ordinarily are subject,[8] Congress, in PURPA, provided an additional jurisdictional path for challenges to state implementation of the statute's avoided cost limitation. The FERC may enforce the requirements of its rules—including the limitations in its pricing rules—against "any State regulatory authority"

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95-1222, 95-1223 (filed April 21, 1995); *Niagara Mohawk Power Corporation v. Federal Energy Regulatory Commission et al.*, N.D.N.Y. No. 95-CV-634 (filed May 11, 1995). The issue involved in those cases is neither presented by this Petition nor affects its "ripeness." If FERC is in error, and a challenge to the determination of the VSCC is yet available, that is the path the NCUC is obliged to pursue. If, conversely, FERC is correct and VEPCO no longer can be relieved of the VSCC's determination of the federal rate, *Nantahala* and *Mississippi Power & Light* require the NCUC to give that rate full effect.

[8] Decisions of the VSCC are directly appealable to the Virginia Supreme Court. Va. Code § 12.1-39.

by initiating an action in the appropriate federal district court. 16 U.S.C. § 824a-3(h)(2)(A). Any electric utility or qualifying facility may request that FERC initiate such an action and, if FERC declines to do so within 60 days, "may bring an action in the appropriate United States district court to require such State regulatory authority . . . to comply with [FERC's] requirements, and such court may issue such injunctive or other relief as may be appropriate." 16 U.S.C. § 824a-3(h)(2)(B). The NCUC surely could have required North Carolina Power to initiate such a proceeding before FERC, in which NCUC could have intervened to protect its interests.[9]

PURPA's structure allows any state potentially affected by a wholesale rate proceeding in another state to protect its interests without the necessity of permitting the type of disruptive collateral challenge countenanced by the decision below. PURPA requires the state to provide "notice and opportunity for public hearing" in establishing wholesale rates under the Act. 16 U.S.C. § 824a-3 (f)(1). Given that requirement, and in the event that the binding nature of such determinations on other states becomes a problem, FERC could require every state commission to notify the commissions of other states potentially affected by a wholesale rate determination under PURPA.[10] Alternatively, the NCUC could require North Carolina Power to notify it of pending Virginia proceedings.

3. The NCUC would dismiss the "trapping" of costs that results from its decision as no more than "an inevitable consequence of doing utility business across state

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[9] FERC rules provide that any State Commission becomes a party to any proceeding upon filing a timely notice of intervention. 18 C.F.R. §§ 385.214(a)(2), 385.1306.

[10] FERC requires notice to the commissions of all affected states in connection with its proceedings under the Federal Power Act and the Natural Gas Act. 18 C.F.R. § 385.1302(a).

lines" where, for example, a utility may be "caught in the middle" between different utility commissions' use of "a different cost allocation methodology . . . for purposes of allocating production costs between states." Pet. App. 75a. The analogy is not at all apt. It may well be "inevitable" that a utility will be "caught in the middle" where each state regulatory commission is discharging its exclusive jurisdiction, and, absent each commission's ability to do so, its authority would be infringed. The cost of utility-owned production plant, for example, may be allocated differently by each state so that the utility recovers less than 100% of its costs. But in the case at bar, no costs subject to disparate recovery through lawful exercise of North Carolina jurisdiction are involved. Once the wholesale rate for Ultra Cogen's power was duly determined by the VSCC under federal law, North Carolina had no jurisdiction to refuse to allow a pass-through on the basis of its disagreement with the VSCC.

Once the wholesale rate is approved by a state exercising delegated federal authority, it is the contemplation of PURPA that the qualifying facility is in a position to proceed with financing and project development. However, the North Carolina decision makes that less likely. If that decision is allowed to stand, the result will be, as pointed out in *Nantahala*, to require the utility to "pretend that it is paying less for the power it receives from [its wholesale supplier], under agreements not subject to NCUC's jurisdiction, than is in fact the case." *Nantahala, supra*, 476 U.S. at 971. As a result, multistate utilities will need prior approval of the price from each jurisdiction where the power from qualifying facilities is resold. If pricing approval were required from the state commission in each state with retail customers receiving a portion of the power, delay could be interminable. Further, because the avoided cost calculation is inherently judgmental, the likelihood that two or more state commissions would fix the same purchase price borders on the whimsical. Instead, the likelihood that the initial determination

of wholesale rates under PURPA will be undercut by another state will deprive that determiation of binding effect.

If the decision of the North Carolina Supreme Court is allowed to stand, state commissions in situations comparable to NCUC's relationship to North Carolina Power may feel compelled to follow the example that now has been set. Every multi-state utility that has been required to purchase power from a qualifying facility is now exposed to added financial risk. It is a risk that is poorly timed. The investor-owned utility industry already is struggling with the complexities of the transition to a more competitive, and increasingly multijurisdictional, environment. *See, e.g.*, 60 F.R. 17662 (April 7, 1995). The industry, and its competitive evolution, are poorly served by the trapped costs created by the decision below.

## CONCLUSION

For all of the aforesaid reasons, the petition by North Carolina Power for a writ of certiorari should be granted.

Respectfully submitted,

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